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RE NG SENG HENG, EX P MAYBAN SECURITIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[BANKRUPTCY NO: D3-29-2983-95]
b 21 JULY 2003

BANKRUPTCY: *Discharge of bankruptcy - Order of discharge - Appeal against discharge of judgment debtor - Whether judgment debtor's assets are insufficient to declare a dividend of 50% - Bankruptcy Act 1967, s. 33(6)(m) - Debts incurred as result of speculation on stock market - Bankruptcy Act 1967, s. 33(6)(e) - Factors considered to prevent unconditional discharge of judgment debtor - Whether appeal to be allowed*

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This was an appeal by the judgment creditor against the decision of the senior assistant registrar in allowing the judgment debtor's application for an order of discharge as a bankrupt under s. 33 of the Bankruptcy Act 1967. A perusal of the official assignee's (OA's) report showed that the bankrupt's (judgment debtor's) credit balance in his account was RM11,995.50 as compared to his debt of RM43,514.04 which was sufficient to declare dividends of approximately 17.4% to the creditors.

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Held:

[1] There was no evidence whatsoever from the bankrupt as to why his assets are insufficient to declare a dividend of 50%. It was therefore undisputed that the judgment debtor's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities so as to satisfy the fact as referred to in s. 33(6)(m) of the Bankruptcy Act 1967. Hence, there was no basis to have allowed the judgment debtor's application for an order of discharge as a bankrupt. (p 257 e-f)

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[2] Furthermore, the judgment debtor in the instant case incurred the losses as a result of speculating on the stock market. Section 33(6)(e) of the Act refers to debts incurred as a result of speculations or gambling. Therefore, there was another fact in existence to prevent the unconditional discharge of the judgment debtor. To allow the discharge of a judgment debtor in this case would make a mockery of the execution proceedings available to creditors and of the provisions of the law available to safeguard the interests of creditors. (p 257 g & 258 a)

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[Appeal allowed.]

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Case(s) referred to:

BBMB Factoring Bhd v. Mariam Sasiman & Ors [2000] 3 CLJ 639 CA ***(refd)***

Dato' Abdullah Hishan Hj Mohd Hashim v. Sharma Kumari Shukla [2000] 7 MLJ 667 HC ***(refd)***

Per Pathmasingam Mavilaganan, ex p Public Bank Bhd [2000] 2 CLJ 92 HC ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew, ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 16(2)(b), (3), 31(1), 33(2), (3), (4), (6)(e), (7), 92

Bankruptcy Rules 1969, r. 196(3)

For the appellant/judgment creditor - Selvamalar Alagaratnam (Preetha Pillay); M/s Skrine

Judgment debtor - In person

For the official assignee - Istazz Hadyan

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Ahmad Makinudin J:

This is an appeal by the judgment creditor against the decision of the senior assistant registrar in allowing the judgment debtor's application for an order of discharge as a bankrupt under s. 33 of the Bankruptcy Act 1967 ("the Act"). The relevant background facts of this case are as follows:

(1) The judgment debtor was adjudicated a bankrupt *via* Adjudication Order and Receiving Order both dated 6 March 1997.

(2) Subsequently, the judgment creditor's solicitors, Messrs Skrine, wrote several letters to the official assignee's office to inquire on the status of the matter and to request for a date to be fixed for the first Creditors' Meeting. The said letters were dated 25 February 1998, 4 July 2000 and 24 April 2001.

(3) The judgment debtor filed his application for an order of discharge dated 19 June 2002.

(4) The said application for discharge was not served on the judgment creditor. The judgment creditor's solicitors, Messrs Skrine were informed *vide* a letter dated 21 June 2002 from High Court Malaya (Bankruptcy Division) that such an application had been filed and fixed for hearing on 25 September 2002.

(5) The judgment creditor filed the notice of intention to oppose the said application for discharge pursuant to r. 196(3) of the Bankruptcy Rules 1969 dated 22 August 2002 and served the same on the judgment debtor and the official assignee.

(6) The Assistant Official Assignee filed the Laporan Pegawai Pemegang Harta or Official Assignee's Report dated 15 October 2002 under s. 33(3) of the Act.

(7) On 16 October 2002, the senior assistant registrar heard the said application for discharge and allowed the same.

(8) On the same date ie, on 16 October 2002 Messrs Skrine received a notice dated 23 September 2002 from the Assistant Official Assignee stating that the first creditors' meeting had been adjourned to 1 October 2002.

This appeal is filed under and pursuant to s. 92 of the Act which provides as follows:

> (1) The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
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> (2) Orders in bankruptcy matters shall, at the instance of any persons aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

It is established that in an appeal of this nature, this court has the jurisdiction and in fact is duty bound to rehear the appeal on the facts and merits unfettered by the decision and findings of the senior assistant registrar. (See the case of *BBMB Factoring Bhd. v. Mariam bte. Sasiman & Ors* [2000] 3 CLJ 639).

Conduct Of The Official Assignee And The Acceptability Of His Report Dated 15 October 2002

In considering this appeal I find it necessary to look into the conduct of the Official Assignee ("OA") as well as the acceptability of the Official Assignee's Report dated 15 October 2002 prepared under s. 33(3) of the Bankruptcy Act 1967 ("the OA's Report").

Section 33(3) of the Act states as follows:

> On the hearing of the application the Court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

It is noted that Messrs Skrine had written to Official Assignee's office letters dated 25 February 1998, 4 July 2000 and 24 April 2001 requesting for the first Creditors' Meeting to be fixed. There was no response whatsoever from Official Assignee's office. Subsequently, on 16 October 2002, well after the said application for discharge had been filed, Messrs Skrine received by post a notice stating that the first Creditors' Meeting had been adjourned from 17 September 2002 to 1 October 2002. During submission before the senior assistant registrar on the said application for discharge on 16 October 2002, the OA did confirm that first Creditors' Meeting had not been held as yet. In view of the undisputed fact that the first Creditors' Meeting had not been held it is questionable how the OA prepared the report dated 15 October 2002. The OA's Report must therefore have been put up without sufficient information from the creditors. Further, para. 8 of OA's Report states that the judgment debtor was adjudicated a bankrupt because he failed to settle his monthly instalments to the bank as a result of a fall in the price of shares. This is not accurate. The judgment debtor was adjudicated a bankrupt because he failed to settle his contra losses that he had incurred as a result of speculating on the stock market. The judgment creditor is not a bank. The judgment creditor is a Securities House. The OA's Report dated 15 October 2002 in my view is therefore erroneous.

It is also noted that the OA's report is both brief and inadequate. It does not state whether any investigation was carried out to determine why the judgment debtor was adjudicated a bankrupt. From the records the judgment debtor was adjudicated a bankrupt on 6 March 1997. There appears to have been no investigation into the question of why no payment was made by the judgment debtor until June 2002 when he made a lump sum payment of RM10,000. Neither does there appear to be any investigation as to where these monies were derived from. Paragraph 2 of the OA's Report merely states that no evidence of assets was produced. There is no mention of any

investigation into his assets. There is no evidence of the OA having concerned himself with the pertinent question of whether the judgment debtor would be able to settle the full debt or at least 50% of same. Section 31(1) of the Act requires the OA to investigate the judgment debtor's exact financial standing. In *Re Lau Kah Lav & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960, the court in response to the OA's contention that it is up to the creditors to do their investigation, stated that the primary duty is upon the OA. His lordship Ian HC Chin J in his judgment at p. 963 on this point had this to say:

> The Official Assignee carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the Official Assignee does not show itself equal to the task of preventing such rip-off the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

Non-compliance With The Requirement Of The Law

Section 33(4) of the Act *inter alia* provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors. Paragraph 2 of the OA's report states that the debtor's statement of affairs was filed by the bankrupt on 13 June 2002. Section 16(2)(b) of the Act provides that it should be filed within 21 days from the date of the Receiving Order unless an extension has been granted by the OA. Section 16(3) of the Act provides that if the debtor fails to do so without reasonable excuse, proof of which shall lie on him, he shall be guilty of contempt of court and may be punished accordingly. There is no evidence by either the judgment debtor as a bankrupt or the OA that an extension was granted by the OA or that there was reasonable excuse for the judgment debtor's delay in filing the statement of affairs. On this point in the case of *Dato' Abdullah Hishan bin Hj. Mohd Hashim v. Sharma Kumari Shukla* [2000] 7 MLJ 667, the court treated non-compliance of s. 16(3) of the Act as very serious and imposed a custodial sentence on the judgment debtor.

It is noted that s. 33(4) of the Act also provides that on proof of the facts mentioned in sub-s. 6, the court shall either refuse the order, suspend the order for a specified time, suspend the order until a dividend of not less than 50% has been paid to the creditors, or grant an order of discharge subject to such conditions aforesaid. The facts mentioned in s. 33(6) of the Act that are relevant to the present case include *inter alia*, the following:

> **Section 33(6)(d)** – that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;
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> **Section 33(6)(e)** – that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs;
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> **Section 33(6)(m)** – that the bankrupt's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities.

A perusal of the OA's Report showed that the bankrupt's (judgment debtor's) credit balance in his account is RM11,995.50 as compared to his debt of RM43,514.04 which is sufficient to declare dividends of approximately 17.4% to the creditors. Based on s. 33(7) of the Act the OA's Report is *prima facie* evidence. There is no evidence whatsoever from the bankrupt as to why his assets are insufficient to declare a dividend of 50%. It is therefore undisputed that the judgment debtor's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities and thereby the fact as referred to in s. 33(6)(m) is proved. This would surely mean that there would be no basis whatsoever to have allowed the judgment debtor's application for an order of discharge as a bankrupt. In *Per Pathmasingam Mavilaganan ex p Public Bank Bhd* [2000] 2 CLJ 92, the court was of the opinion that the bankrupt in that case should not be discharged on account of the fact that his assets were sufficient to declare only a dividend of 31.27%. Furthermore, the judgment debtor in the instant case incurred the losses as a result of speculating on the stock market. Section 33(6)(e) refers to debts incurred as a result of speculations or gambling. There is therefore another fact in existence to prevent the unconditional discharge of the judgment debtor. From the contents of the OA's Report it is apparent therefore that the dividend declared is insufficient and is not a reasonable or fair amount to cover the debt incurred by the

judgment debtor. In my view to allow the discharge of a judgment debtor on these terms will make a mockery of the execution proceedings available to creditors and of the provisions of law available to safeguard the interests of creditors. It will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors.

For the reasons above stated the appeal is allowed with costs and the Senior Assistant Registrar's Order of discharge as a bankrupt of the judgment debtor is hereby set aside.